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NO. 87-1243

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

DIEGO CHAVEZ-TESINA,

Petitionor,

- VS -

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
JUL 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

# PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DIEGO CHAVEZ-TESINA
P.O. BOX 1000 H-UNIT
MILAN, MI. 48160

88 5158

DIEGO CHAVEZ-TESINA,

Petitioner,

- VS -

UNITED STATES OF AMERICA,

Respondent.

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Diego Chavez-Tesina, asks leave to file the attached petition for a writ of certiorari without prepayment of cost and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the United States District and United States Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

Respectfully Submitted,

Diego Chavez-Tesina, Pro Se

Supreme Court, U.S.
FILED
JUL 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

88 5158

ORIGINAL

DIEGO CHAVEZ-TESINA,

Petitioner,

- VS -

UNITED STATES OF AMERICA,

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**AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

I, Diego Chavez-Tesina, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty I am unable to pay the cost of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceed in this Court are true.

1. Are you presently employed? Yes X No ___

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   $25.00 per month; F.C.I. Milan; Box 1000; Milan, Mich. 48160



   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes ___ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes ___ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   ANA MILENA CHAVEZ: (WIFE); YELKO CHAVEZ: (SON); ALEXANDER CHAVEZ: (SON)
   JONATHAN CHAVEZ: (SON)

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/S/ Diego Chavez-Tesina

Subscribed and sworn to before me this 15th day of JULY, 1988.

/S/
NOTARY
AUTHORIZED BY THE ACT OF
JULY 7, 1955 TO ADMINISTER
OATHS (is USC, 4004)

My commission expires 2/89



## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER PETITIONER WAS CONSTITUTIONALLY ENTITLED TO AN ARTICLE III JUDGE DURING VOIR DIRE AND JURY SELECTION WHERE HE STRENGEOUSLY OBJECTED TO THE USE OF A MAGISTRATE FOR THOSE PURPOSES?

2. WHETHER THE USE OF A MAGISTRATE, OVER PETITIONER'S OBJECTION, FOR VOIR DIRE AND JURY SELECTION VIOLATED THE SEPARATION OF POWERS DOCTRINE OF THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii & iv |
| OTHER AUTHORITIES | iv |
| STATUTES | iv |
| RULES | iv & v |
| CONSTITUTIONAL PROVISIONS INVOLVED | 1 & 2 |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF THE FACTS | 2 - 6 |
| REASON FOR GRANTING THE WRIT A | 6 - 12 |
| REASON FOR GRANTING THE WRIT B | 12 - 15 |
| CERTIFICATE OF SERVICE | 15 |
| APPENDIX | |




TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| BATSON V. KENTUCKY, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) | 7 |
| CHADHA V. INS, 634 F. 2d 408, 422, 431 (9th Cir. 1980) aff'd __ U.S. __, 103 S. Ct. 2764, 77 L. Ed. 2d 317 | 13 |
| GANNETT CO., INC. V. DePASQUALE, 443 U.S. 368, 99 S. Ct 2898, 61 L. Ed. 2d 608 (1979) | 8 |
| GRAY V. MISSISSIPPI, __ U.S. __, 107 S. Ct. 2045, 2056, 95 L. Ed. 2d 622 (1987). | 6 |
| JORDAN V. MASSACHUSETTS, 225 U.S. 167, 176, 32 S. Ct. 651, 652, 56 L. Ed. 2d 1038 (1912) | 8 |
| NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPELINE CO., 458 U.S. 50, 58-60, 102 S. Ct. 2858, 2865-66, 73 L. Ed. 2d 598 (1982) | 13 |
| O'BRYAN V. ESTELLE, 714 F. 2d 365 (5th Cir. 1983), cert denied 465 U.S. 1013, 104 S. Ct. 1015, 79 L. Ed. 2d 245 (1984) | 9 |
| PRESS-ENTERPRISE CO. SUPERIOR COURT, 464 U.S. 501, 509 n. 8, 104 S. Ct. 819, 823 n. 8, 78 L. Ed. 2d 629 (1984) | 8 |
| REYNOLDS V. UNITED STATES, 98 U.S. (8 Otto) 145 (1879) | 10 |
| SMITH V. PHILLIPS, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982) | 8 |
| SWAIN V. ALABAMA, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759 (1965) | 7 |
| UNITED STATES V. RADDATZ, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) | 9 |
| UNITED STATES V. VELAZQUEZ, 490 F. 2d 29, 34 (2d Cir. 1973) | 8 |
| UNITED STATES V. WILL, 449 U.S. 200, 217-221, 101 S. Ct. 471, 481-84, 66 L. Ed. 2d 392 (1980) | 13 |

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| WAINWRIGHT V. WITT, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)..... | 10 |
| WITHERSPOON V. ILLINOIS, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)..... | 9 |


### OTHER AUTHORITIES


| | PAGE |
|---|---|
| 4 WILLIAM BLACKSTONE, COMMENTARIES *353..... | 7 |
| H.R. REP. NO. 1076, 90th CONG., 2d SESS., REPRINTED IN 1968 U.S. CODE CONG. & ADMIN. NEWS 1792..... | 7 |


### STATUTES


PAGE

TITLE 18 U.S.C. SECTION 1952

TITLE 18 U.S.C. SECTION 1961

TITLE 18 U.S.C. SECTION 1962(c)

TITLE 18 U.S.C. SECTION 3161

TITLE 18 U.S.C. SECTION 3174

TITLE 21 U.S.C. SECTION 841

TITLE 21 U.S.C. SECTION 846

TITLE 28 U.S.C. SECTIONS 631-639

TITLE 28 U.S.C. SECTION 1254(1)

TITLE 28 U.S.C. SECTION 2254(d)


### RULES


FEDERAL RULES OF CRIMINAL PROCEDURE 8(b)

FEDERAL RULES OF CRIMINAL PROCEDURE 12(b




### RULES


FEDERAL RULES OF CRIMINAL PROCEDURE 14


### CONSTITUTIONAL PROVISIONS INVOLVED


UNITED STATES CONSTITUTION AMENDMENT V

UNITED STATES CONSTITUTION AMENDMENT VI

UNITED STATES CONSTITUTION ARTICLE III SECTIONS 1&2

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

SECOND CIRCUIT

Diego Chavez-Tesina, (here-in-after referred to as "Petitioner") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming of conviction entered against this Petitioner by the United States Court for the Eastern District of New York (the Honorable McLaughlin, J.).

OPINION BELOW

The published opinion and order of the Court of Appeals affirming the judgment of conviction appears in Appendix, United States of America -V- Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, Hugo Shanks-Carrera, William Salazar, Docket Nos. 87-1243, 87-1244, 87-1245, 87-1246, 87-1264.

JURISDICTION

On June 1, 1988, the Court of Appeals entered its order affirming the judgment of conviction. This court's jurisdiction is invoked under Title 28 United States Code 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall. . .be deprived of life liberty, or property, without Due Process of law".



Article III Section 1:

> "Judicial Power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish."

STATUTORY PROVISIONS INVOLVED

Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, reprinted in 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. Sections 631-639 (1982 & Supp. III 1985).

STATEMENT OF THE CASE

This Petition is taken pursuant to a judgment of conviction entered on the 14th day of May 1987 in the United States District Court for the Eastern District of New York (McLaughlin, J.), sentencing him to concurrent terms of Twenty years on his conviction of operating a racketeering enterprise in violation of 18 U.S.C. 1961, Five years on his conviction for violation of the Travel Act, 18 U.S.C. 1952 and two Fifteen year terms for conspiracy and possession of narcotics in violation of 21 U.S.C. 841 and 846 followed by lifetime parole and the Second Circuit Court of Appeal's affirming all of the judgments of the District Court.

STATEMENT OF THE FACTS

Petitioner's convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). Dea Special Agent Rene de la

Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to William Salazar. Salazar and Garcia sold ke la Cova two-eights of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers. Salazar mentioned that his business partner, a Columbian of Japanese descent who lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched this Petitioner, who was a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered this Petitioner, who allegedly told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to this Petitioner's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved this Petitioner. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted Beimar Vallejo and said that he had something "very, very good." Salazar telephoned Adela Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their personal use.



The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. At this point Shanks-Carrera was observed going inside the building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine--the agreed-upon first installment. This Petitioner and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar--and verifying that that transaction involved cocaine--as well as discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-Count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. These defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five individuals were on nine counts of the indictment, the broadest of which alleged that Salazar and this Petitioner conducted a narcotics racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1962(c) (1982) (Count 2). Salazar, this Petitioner, and Shanks-Carrera

were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 kilograms of cocaine under 21 U.S.C. Sections 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving the accused individuals dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. Sections 841, 846 (1982 & Supp. IV 1986); (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale on one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, this Petitioner was charged with interstate travel in aid of racketeering under 18 U.S.C. Section 1952 (1982 Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and this Petitioner. Thus, the RICO count incorporated the remaining counts against all of the accused.

The accused individuals moved unsuccessfully for severance pursuant to Federal Rules. of Criminal Procedure 8(b), 12(b), and 14. After jury selection--presided over by a magistrate--trial commenced on February 17, 1987 and concluded with the accused convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; this Petitioner for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with the intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent



to distribute. It should be specifically noted by this Court that Shanks-Carrera was acquited on the conspiracy charge.

## REASON FOR GRANTING THE WRIT

### A. PETITIONER DIEGO CHAVEZ-TESINA WAS CONSTITUTIONALLY ENTITLED TO AN ARTICLE III JUDGE AT THE JURY SELECTION STAGE OF HIS TRIAL, WHERE HE STRENGEOUSLY OBJECTED TO A MAGISTRATE PRESIDING OVER THOSE PROCEEDINGS.

It has been suggested that jury selection is sufficiently preliminary to the "trial" of a criminal case to escape constitutional concerns and difficulties of statutory construction attending the assertion that an additional duty may include presiding over the trial itself. This Most Honorable Court must reject this effort to separate jury selection and trial for two reasons.

First, this Most Honorable Court is respectfully requested to see the selection of the jury as an essential component of the trial itself "because the impartiality of the adjudicator goes to the very integrity of the legal system." Gray V. Mississippi, ___ U.S. ___, ___ 107 S. Ct. 2045, 2056, 95 L. Ed. 2d 622 (1987). Second, even if viewed as a pretrial matter, the difficulties of review by an Article III judge of a magistrate's rulings in jury selection--and the absence of a statutory procedure for that review in the face of explicit review procedures for other pretrial matters--should leave this Court unconvinced that Congress intended to allow delegation of this important task.

Petitioner Chavez-Tesina asserts that selection of a petit jury from a venire was an important part of his trial. He further, respectfully, reminds this Most Honorable Court that at common law only the judge could preside over jury selection in felony cases. 4 William Blackstone, Commentaries *353. Its tie to trial is also illustrated by consistent judicial insistence upon its fairness as a component of trial. This Court has previously noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." Swain V. Alabama, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759 (1965). Only relatively recent this Court has attempted to free the selection process of racial bias by prescribing a process for claims that the prosecutor is using peremptory challenges to exclude racial minorities. See Batson V. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); See also H.R. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 1792 (discussing the Jury Selection and Service Act of 1968). Such concern plainly rejects the view that jury selection is a preliminary and essentially ministerial act. At the least it is an essential instrument to the delivery of a defendant's constitutionally secured right to a jury trial rooted in the commands of due process, if not the trial guarantees of the Sixth Amendment and Section 2 Article III themselves.

At some point the accusatory process shifts from a fact-gathering and charging phase to its primary task of deciding guilt. It is suggested that this ought to be a floating point that adjusts to the issue. This suggestion gathers strength from the circumstances that double jeopardy does not attach until the jury is sworn. But all other trial protections are in force when jury selection begins. For example jury selection is a part of the trial for purposes of the Speedy Trial Act. 18 U.S.C. Sections 3161-3174. The rights of the accused to be present, of confrontation, of counsel and of public



proceedings do not await the swearing of the petit jury, but are all enjoyed at the jury selection stage. That Petitioner Chavez-Tesina enjoy such rights during jury selection ought not be surprising. "Due process implies a tribunal both impartial and mentally competent to afford a hearing," Jordan V. Massachusetts, 225 U.S. 167, 176, 32 S. Ct. 651, 652, 56 L. Ed. 1038 (1912), "a jury capable and willing to decide the case solely on the evidence before it." Smith V. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d (1982).

That double jeopardy does not attach until a jury is sworn does not suggest that the selection of the petit jury is preliminary. The jeopardy line is an accommodation of the government's prosecutorial discretion and fact-gathering power and Chavez-Tesina's right to be free of double jeopardy. The line represents "the broad perception that the Government's action has reached the point where its power to retrace its steps must be checked by the 'countervailing interests of the individual protected by the double jeopardy clause of the Fifth Amendment.'" Press-Enterprise Co. V. Superior Court, 464 U.S. 501, 509 n. 8, 104 S. Ct. 819, 823 n. 8, 78 L. Ed. 2d 629 (1984)(quoting United States V. Velasquez, 490 F. 2d 29, 34 (2d Cir. 1973)); See also Gannett Co., Inc. V. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

In Press-Enterprise, supra, this Most Honorable Court unanimously rejected the argument that jury selection is sufficiently preliminary and divorced from the trial's search for truth that it need not be open. This Court explained that "the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Id. at 505, 104 S. Ct. at 821. This Court traced the history of jury selection

noting its open character, from trials as early as the Norman Conquest. Of course, Press-Enterprise was an explication of First Amendment rights. But Petitioner Chaves-Tesina's point is that jury selection is and has been regarded as a critical part of trial; that the line between preliminary and trial issues is not etched in one place for all purposes does not suggest otherwise.

Second, Petitioner Chaves-Tesina asserts, that if jury selection was seen as a preliminary matter, the superintendence by an Article III judge of the magistrate's handling of jury selection would be difficult at best. In United States V. Raddatz, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980), the majority did not insist that a district judge personally hear disputed testimony, it did insist an Article III judge have the right of de novo review--plenary power to reject findings and insist on a new evidentiary hearing. But, surely such power must be real and not illusory. Review of a trial judge's rulings on challenges to veniremen is difficult at best, as illustrated by this Court's experience in administering the standards of Witherspoon V. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). Witherspoon set the measure for veniremen's views regarding the death penalty in capital cases. The lower courts, including the Fifth Circuit, read Witherspoon to require de novo review of a state trial judge's rulings on challenges made in the course of jury selection. This proved to be a difficult task. See, e.g., O'Bryan V. Estelle, 714 F. 2d 365 (5th Cir. 1983), cert. denied, 465 U.S. 1013, 104 S. Ct. 1015, 79 L. Ed. 2d 245 (1984).

In Wainwright V. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), this Court rejected the de novo standard in favor of the presumption of correctness standard of 28 U.S.C. Section 2254(d) (fairly supported by the record). This Most Honorable Court noted the difficulties of such a de novo standard, concluding that "deference must be paid to the trial judge who sees and hears the juror". Wainwright, 105 S. Ct. at 853. It pointed to Reynolds V. United States, 98 U.S. (8 Otto) 145 (1879), in which the Court observed:



> "The manner of the juror while testifying is often times more indicative of the real character of his opinion than his words. That is seen below, but cannot always be sperad upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case." Wainwright, supra.

The Wainwright court also rejected the suggestion that a trial judge must make explicit findings in ruling on challenges for cause, recognizing the unique importance of sight and sound in the nigh intuitive judgments of a trial judge's rulings in the course of voir dire. Id., 105 S. Ct. at 855. Squaring this difficulty with Raddatz's insistence upon superintendence by an Article III judge poses problems. An effort to engage in de novo review would be difficult and often impossible. Of course, one might conclude that a district court has the inherent power simply to conduct the voir dire a second time. But putting aside that such duplicative effort frustrates the very efficiency claims made in its support, such a power also faces serious practical problems in jury selection. The second voir dire or rehearing of testimony may never capture the original scene, and carrying a challenged veniremen to a second interrogation before the district judge would be a delicate exercise at best. "The nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless." Gray V. Mississippi, ___U.S. at ___, 107 S. Ct. at 2055.

Petitioner Chavez-Tesina contends that unlike dispositive pretrial motions, there is no opportunity to convince the jury afresh at trial.

The absence of statutorily-prescribed review gains no comfort by finding inherent power to review by a constitutionally adequate standard, because such a savings exercise fails to respond to the inquiry into congressional purpose--a purpose illuminated by the failure of Congress to detail a standard or process for review despite the demonstrated view of its importance. The relevant point is, Petitioner Chavez-Tesina submits, this Court ought not lightly attribute to Congress the purpose to enter this thicket with no provision for review, whether or not these practical problems might be surmounted.

In Petitioner Chavez-Tesina's situation it is noted that he vehemently objected to the Magistrate's presiding over the jury selection, alleging an abundance of prejudice.

It should be difficult for this Most Honorable Court to view jury selection as fit for delegation to magistrates as part of a congressional effort to free judges for performance of their "traditional adjudicatory duty." Rather, this Court should see jury selection as such an integral component of trial that it should not be persuaded that Congress envisioned its delegation to magistrates.

It is suggested by Petitioner Chavez-Tesina that the sole limit of the congressional grant, by the additional duty section, of the power to delegate is that the delegation not violate another law or the Constitution. Petitioner contends that such a broad reading of congressional purpose would render superfluous the balance of the statute. By that reading, the additional duty



language was all that was necessary. Fairly read in context, Congress never intended that this language swallow all that preceded it. Additional duty is a residuum, granting the power to delegate any task not otherwise forbidden after carving away that congery of duties that Congress never envisioned would be delegated. This Most Honorable Court is respectfully requested by Petitioner Chavez-Tesina not to be persuaded that Congress intended to grant authority to judges to delegate to magistrates the authority to preside over felony trials and over activities integral to and intimately tied with trial.

Simply put, whatever the power of Congress may be, this Court must not be persuaded that Congress intended that "additional duty" include presiding over jury selection in felony cases. Therefore, the District Court erred in allowing the magistrate to preside over the selection of the jury in Chavez-Tesina's case. And since Petitioner, through his trial attorney, vehemently objected this Most Honorable Court is respectfully requested to grant certiorari so as to review this significant Constitutional question.

## REASON FOR GRANTING THE WRIT

### B. THE TRIAL JUDGE'S DESIGNATION OF A MAGISTRATE TO CONDUCT VOIR DIRE AND THE SUBSEQUENT SELECTION OF THE PETIT JURY IN A FELONY CASE CLEARLY VIOLATE THE SEPARATION OF POWERS.

Petitioner Chavez-Tisina's challenge is based on the implicit command of Article III that the judicial power of the United States is confined to judges holding commissions under and cloaked with the protections of that article, and

the corollary principle of Separations of Powers. Article III is one of the provisions of the Constitution which delineates the Separation of Powers among the branches of government. The attributes of Article III judges, permanency in office and the right to an undiminished compensation, are as essential to the independence of the judiciary now as they were when the Constitution was framed. See The Federalist Nos. 78 & 79 (A. Hamilton); Nothern Pipeline Construction Co. V. Marathon Pipe Line Co., 458 U.S. 50, 58-60, 102 S. Ct. 2858, 2865-66, 73 L. Ed. 2d 598 (1982); United States V. Will, 449 U.S. 200, 217-221, 101 S. Ct. 471, 481-84, 66 L. Ed. 2d 392 (1980). In addition to the unimpeached precedent supporting this proposition, experience attests to the substance and reality of the guarantees. A separate and independent judiciary, and the guarantees that assure it, are present constitutional necessities, not relics of antique ideas.

It has been observed that Separation of Powers protections, in some cases, have two components. One axis reaches to the person affected by government action and encompasses his or her relation to a constitutional branch; the other axis runs from each governmental branch to the others to insure separation and independence in the constitutional structure. Chadha V. INS, 634 F. 2d 408, 422, 431 (9th Cir. 1980), aff'd ___ U.S. ___, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). These two aspects of the separation of powers rule are applicable in Petitioner Chavez-Tesina's situation here. Where the jury selection task is transferred or assigned from an Article III judge to a magistrate, the rights of Petitioner Chavez-Tesina and the relations between the separate branches of the government are implicated. First, this Court must consider whether transfer, in this case, of the jury selection to a magistrate invaded rights that were personal to Petitioner Chavez-Tesina. Second, even if Petitioner



Tesina had consented to the procedure, this Court should examine whether the existence or operation of the alternate forum compromises the essential independence of the judiciary.

At the outset, and including every aspect of criminal cases, we must recognize the principle that the accused in a felony case in a federal forum is entitled to have that cause, in its entirety, heard before an Article III judge. This Most Honorable Court is respectfully asked to grant certiorari for the purpose of deciding this case on the premise that the situation here falls within none of the recognized or potential exceptions to the referenced principle.

The independent character of federal adjudication, in felony cases, under Article III judges imparts to a judgment qualities of authority and respect that are well understood. It follows that the federally accused has a personal right, in felony cases, to demand Article III judges at every stage of his/her felony trial.

Petitioner asserts that a provision allowing an Article III judge to transfer his duties, in a felony trial, to a non-Article III magistrate, over his objection, clearly violated his constitutional rights that Article III was designed to protect.

WHEREFORE and for all of the foregoing reasons embodied herein this Court is respectfully requested to grant certiorari for the purpose of setting precedent by which all Circuits is to be guided on the question of whether it is constitutionally permissible for a magistrate to preside over voir dire and selection of a petit jury where either party objects.

Respectfully Submitted,

Diego Chavez-Tesina, Pro Se

CERTIFICATE OF SERVICE

I, Diego Chavez-Tesina, do say that on this date, July 18, 1988, that I have forwarded a true and correct copy of the foregoing Petition and the attached Appendix, properly addressed to the Solicitor General's Office; United States Department of Justice; Tenth and Constitution Avenue, N.W.; Washington, D.C. 20530, in a duly franked envelope.

Diego Chavez-Tesina



Appendix

FOR THE SECOND CIRCUIT

Nos. 238, 239, 240, 241, 242—August Term 1987

(Argued October 19, 1987 Decided June 1, 1988)

Docket Nos. 87-1243, 87-1244, 87-1245, 87-1246, 87-1264

UNITED STATES OF AMERICA,

*Appellee*,

—v.—

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,

*Defendants*,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,

*Defendants-Appellants*.

Before:

OAKES, CARDAMONE and MAHONEY

*Circuit Judges*



Defendants William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera appeal from the May, 1987 judgments of conviction for narcotics-related offenses entered by the United States District Court for the Eastern District of New York (McLaughlin, J.) after a jury trial.

Judgments affirmed.

Judge Oakes dissents in a separate opinion.

THOMAS E. NOOTER, New York, New York (Freeman, Nooter & Ginsberg, New York, New York, of counsel), *for Appellant Beimar Vallejo*.

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BERT H. NISONOFF, Forest Hills, New York, *for Appellant Hugo Shanks-Carrera*.

JERALD LEVINE, Jackson Heights, New York, *for Appellant Diego Chavez-Tesina*.

HARRY C. BATCHELDER, JR., New York, New York, *for Appellant William Salazar*.

SEAN F. O'SHEA, Assistant United States Attorney, Brooklyn, New York (Andrew J. Maloney, United States Attorney, Eastern District of New York; John Gleeson and Emily Berger, Assistant United States

Attorneys, of counsel), *for Appellee United States of America.*

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CARDAMONE, *Circuit Judge*:

This appeal requires us to decide at what stage in a criminal prosecution a defendant is entitled to the presence of an Article III judge. Appellants urge that a defendant may claim such a right at the commencement of jury selection. There is no doubt that everything has its season, and there is a time when an accused is entitled to the presence of a federal district court judge. But that season does not necessarily come with the commencement of the petit jury selection. In this case, a magistrate presided over the jury selection for the trial of appellants, William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera. They appeal from the May, 1987 judgments of convictions entered against them in the United States District Court for the Eastern District of New York (McLaughlin, J.) for narcotics-related offenses.

## FACTS

Appellants' convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Special Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to the defendant Salazar. Salazar and Garcia sold de la Cova two-eighths of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers. Salazar mentioned that his business partner, a Columbian of Japanese descent who had lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched the defendant Chavez-Tesina, a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered Chavez-Tesina, who told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to Chavez-Tesina's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved the appellants. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted the defendant Vallejo and said that he had something "very, very good." Salazar telephoned the defendant Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their "personal use".

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. The defendant Shanks-Carrera was observed going inside the

building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine—the agreed-upon first installment. Chavez-Tesina and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar—and verifying that that transaction involved cocaine—as well as discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. These defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five appellants were tried on nine counts of the indictment, the broadest of which alleged that Salazar and Chavez-Tesina conducted a narcotics racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982) (Count 2). Salazar, Chavez-Tesina, and Shanks-Carrera were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 kilograms of cocaine under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving



the appellants dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986): (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale of one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, Chavez-Tesina was charged with interstate travel in aid of racketeering under 18 U.S.C. § 1952 (1982 & Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and Chavez-Tesina. Thus, the RICO count incorporated the remaining counts against all of the appellants.

Appellants moved unsuccessfully for severance pursuant to Fed. R. Crim. P. 8(b), 12(b), and 14. After jury selection—presided over by a magistrate—trial commenced on February 17, 1987 and concluded with the appellants convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Chavez-Tesina for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with the intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. Shanks-Carrera was acquitted on the conspiracy charge. This appeal followed. We affirm.

## DISCUSSION

Appellants collectively and individually raise the myriad of issues common in appeals from multiple defendant trials. Although each will be addressed in turn, the principal issue presented is whether a magistrate—rather than a district court judge—may preside during jury selection.

### I *Jury Selection by a Magistrate*

Judge McLaughlin assigned the task of jury selection to a magistrate pursuant to local rules for the Eastern District of New York. E.D.N.Y. Magistrates R. 1 ("Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.") Salazar, Chavez-Tesina, and Gomez objected to the delegation at the beginning of *voir dire* and Salazar renewed his objection after the jury had been selected. The district judge upheld the delegation, but offered objectants *de novo* review of any challenges to jurors for cause which were not sustained by the magistrate. Because the only juror so challenged had been excused by consent, appellants declined the offer. There is no claim of prejudice from the delegation of the *voir dire* to the magistrate. Rather, appellants argue that allowing a magistrate to preside at the jury selection in a felony case without a defendant's consent contravenes either the Federal Magistrates Act or Article III of the United States Constitution.

#### A. *Statutory Provisions*

In 1968 Congress established the office of United States magistrate, which replaced the office of United States commissioner. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)). Controversy soon developed regarding the scope of a magistrate's duties. *See, e.g., Wingo v. Wedding*, 418 U.S. 461 (1974) (magistrates not authorized under the Act to conduct habeas corpus evidentiary hearings). As a result, Congress amended the Federal Magistrates Act in 1976 "to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6162 [hereinafter 1976 House Report].

As amended, 28 U.S.C. § 636(b)(1)(A)[1] provides that a magistrate may hear and determine pretrial matters—with certain enumerated exceptions—subject to reconsideration by a district judge when it is argued that the magistrate's order is clearly erroneous or contrary to law. Under § 636(b)(1)(B),[2] a magistrate may conduct hearings on

1 Section 636(b)(1)(A) provides:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A) (1982).

2 Section 636(b)(1)(B) provides:

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals con-

specified motions and file proposed findings and recommendations with a district judge. These findings and recommendations are subject to *de novo* determination by a district judge. Finally, § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Because no contemporaneous objection had been made to the process in *United States v. DeFiore*, 720 F.2d 757, 765 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984), we left open the question of whether 28 U.S.C. § 636 permits a district judge to delegate to a magistrate the power to preside over jury selection in felony cases. *Haith v. United States*, 342 F.2d 158, 159 (3d Cir. 1965) (per curiam) (failure to object to or claim prejudice from delegation waives right to contest delegation), *aff'g* 231 F. Supp. 495 (E.D. Pa. 1964). Here, contemporaneous objections were made and thus the issue is squarely before us.

Our sister circuits are divided on the proper scope of § 636. The Ninth Circuit has held that a magistrate may—consistent with both § 636 and the Constitution—preside over jury selection despite the defendant's objection so long as *de novo* review is available in the district court. *See United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir.),

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victed of criminal offenses and of prisoner petitions challenging conditions of confinement.

28 U.S.C. § 636(b)(1)(B) (1982). Section 636(b)(1) further provides that

> [a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

*Id.* § 636(b)(1).



*cert. denied*, 474 U.S. 847 (1985); *United States v. Bezold*, 760 F.2d 999, 1002 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986); *see also United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir. 1983) (approving of delegation in dictum). Recently, the Fifth Circuit sitting *en banc* determined that it was not Congress' purpose to permit such a delegation under § 636 and that therefore a magistrate may not preside in jury selection over defendant's protests. *See United States v. Ford*, 824 F.2d 1430, 1438 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 741 (1988).

The first issue to be resolved is what was the aim of Congress when it enacted § 636. Discussing the "additional duties" provision of § 636(b)(3), Congress stated that

> [t]his subsection enables the district courts to continue innovative experimentations in the use of [magistrates]. At the same time, placing this authorization in an entirely separate subsection emphasizes that *it is not restricted in any way by any other specific grant of authority to magistrates.*
>
> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

1976 House Report, *supra*, at 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6172 (emphasis added); *see also* S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976) (same statement).

Appellants contend that delegation of jury selection to a magistrate is precluded by a close textual analysis of § 636. They first argue that Congress' purpose was to permit only pretrial matters to fall within § 636(b) and that jury selec-

tion, as an integral part of a trial, is not a pretrial matter. In support of their argument, appellants note the reference to "pretrial matters" in the House Report quoted above. But the language of that Report plainly states that the subsection grants to district courts the freedom to experiment *beyond* duties traditionally categorized as "pretrial." Hence, even assuming *arguendo* that jury selection falls on the "trial" side of the line between "trial" and "pretrial"—a line that is, at best, often blurred—the legislative history of § 636(b) does not preclude delegation of that task to a magistrate.

Appellants next direct attention to provisions of § 636 that allow magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(3) (1982), and jury or nonjury civil trials, *id.* § 636(c) (1982 & Supp. III 1985), conditioned in each case upon the consent of the parties. As a matter of consistent statutory interpretation, they argue, it cannot have been Congress' objective to allow magistrate selection of juries in felony cases *without* consent of the parties. Yet conditioning the holding of an entire trial before a magistrate on consent is not conclusive in the context of the separate and distinct function of jury selection. Moreover, the legislative history states in so many words that Congress considered the "additional duties" provision to be broad in scope and unrestricted by "any other specific grant of authority to magistrates." Hence, we reject appellants' textual arguments.

We conclude that jury selection delegation to a magistrate is within the scope of § 636(b)(3) and consistent with the Federal Magistrates Act. We are mindful of the familiar canon of construction that requires statutes to be construed so as to avoid constitutional questions. *E.g.*, *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct.



3245, 3252 (1986). Nonetheless, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Id.* Here, the legislative will is evident. As the Seventh Circuit stated, "The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)." *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340-41 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979); *see also Ford*, 824 F.2d at 1441-42 (Rubin, J., dissenting) (only limit on § 636(b)(3) is Constitution or conflicting law).

### B. *Constitutional Concerns*

The remaining question is whether Article III of the United States Constitution precludes a magistrate from presiding over jury selection in a felony case without the defendant's consent. Article III, § 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, it provides salary protection and tenure for judges appointed to federal courts in order to ensure that the judicial branch retains its independence from the two other branches of government. There are two aspects to the separation of powers doctrine—a cornerstone of our federal constitutional structure—that are implicated on this appeal. The first addresses the structural relationship between the three branches of government and the second examines the rights secured to individuals by an independent judiciary. *See Schor*, 106 S. Ct. at 3256; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc) (noting

dual components of separation of powers cases), *cert. denied*, 469 U.S. 824 (1984).

1. *Relationships Between the Three Branches*

The first, structural component examines the separate and independent relationship between the judiciary and the other two branches of government. *Schor*, 106 S. Ct. at 3256. Although separation of powers refers to the division of the federal government into three separate branches, the branches are not unconnected from each other. James Madison argued that "unless these departments be . . . blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never . . . be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (New American Library ed. 1961).

The concept of "blended" branches has been best capsulized by Justice Jackson, who observed how the Constitution diffused power between the three branches to secure liberty, but at the same time contemplated the integration of the three branches so as to have a workable government: "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Each branch does not exist in its own separate, airtight compartment. In determining whether an act of Congress violates the integrity of one branch the question focuses on "the extent to which" the statute prevents that branch "from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Such an approach implements separation of powers concerns and also the theory of checks and balances—an integral component of the constitutional structure—which serves to prevent each branch from encroaching on the power of the other. *The Federalist*, *supra*, No. 51, at 321-22 (J. Madison).



With this background, we turn first to Congress' purpose. Congress aimed through the Federal Magistrates Act to make federal courts more efficient by the expanded use of magistrates. *See* H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4257; *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (testimony of Sen. Tydings) ("We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."). Although laudable, efficiency does not resolve separation of powers concerns, for " 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .' " *Bowsher v. Synar*, 106 S. Ct. 3181, 3193-94 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

In the instant case, appellants argue that jury selection is an "inherently judicial" task that cannot be delegated to a non-Article III judge. "[G]uided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,' " *Schor*, 106 S. Ct. at 3256 (quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 105 S. Ct. 3325, 3336 (1985)), we examine the effect of such a delega-

tion. The Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection. At the same time, magistrates are completely subject to Article III judges because the district judges appoint, 28 U.S.C. § 631(a), remove, *id.* § 631(b), and decide what matters are assigned magistrates, *id.* § 636(b)(4). Significantly, a trial court is not required to appoint a magistrate to preside over jury selection. Rather, the decision is left entirely to the Article III court's discretion. In sum, the delegation of authority here occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch's *encroaching upon* the power of another. *Cf. United States v. Raddatz*, 447 U.S. 667, 682-83 (1980) (distinguishing administrative agencies from officers of the court).

Even assuming the delegated task itself might be labelled "inherently judicial," Article III concerns are not necessarily implicated when the task is not delegated conclusively to a non-Article III tribunal. *See Raddatz*, 447 U.S. at 681-84 (upholding suppression hearing referred to magistrate with review); *Mathews v. Weber*, 423 U.S. 261, 271-72 (1976) (upholding social security benefit cases referred to magistrate with review); *see also Ford*, 824 F.2d at 1444-45 (Rubin, J., dissenting) (rejecting "inherently judicial" argument); *United States v. Saunders*, 641 F.2d 659, 663 (9th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981) (same). So long as the " 'essential attributes' of judicial power are retained in the Art. III Court," *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (plurality opinion of Brennan, J.), the delegation of power in a statute does not contravene Article III.



The availability of *de novo* review in this case vested the ultimate decision regarding the composition of the jury with the trial court. Thus, the trial court retained the inherently judicial power to make the final decision. Significantly, retention by an Article III court of this power has been considered crucial in Article III cases. In *Raddatz*, for example, the Supreme Court held that referral of a suppression motion to a magistrate under § 636(b)(1) did not violate Article III or the defendant's due process rights. 447 U.S. at 680-81, 684. Distinguishing the question of whether final decisionmaking power on a suppression motion could be delegated to a non-Article III tribunal, *id.* at 681, the Court stated that "delegation does not violate Art. III so long as the ultimate decision is made by the district court," *id.* at 683. As Justice Blackmun commented, there is little threat to the independence and authority of the judicial branch "when the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors." *Id.* at 686 (Blackmun, J., concurring); *see also Northern Pipeline*, 458 U.S. at 81-83 (opinion of Brennan, J.) (discussing *Raddatz*); *Mathews*, 432 U.S. at 271 (final decision remains with judge); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 933 (1988) (advocating theory "that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III").

Similarly, the trial judge here was "waiting in the wings" and offered *de novo* review, which the appellants declined. Nor do appellants claim that *de novo* review would have been ineffective. *Raddatz* compels the conclusion that neither delegation of *voir dire* per se nor delegation under the facts of this case erodes the power and

independence of the judiciary. Consequently, we perceive no conflict with the first component of the separation of powers doctrine.

2. *Article III Rights*

The second component of the separation of powers doctrine safeguards the rights of litigants vis-a-vis the judicial branch. Litigants have a "right to have claims decided before judges who are free from potential domination by other branches of government." *Schor*, 106 S. Ct. at 3256 (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)). This component most often arises in the context of a litigant's consenting to a non-Article III forum. *E.g.*, *Schor*, 106 S. Ct. at 3256-57; *Pacemaker Diagnostic*, 725 F.2d at 541-42. Here, appellants affirmatively objected to the delegation of *voir dire* to a magistrate, thereby rendering of greater import the second component of the doctrine. In cases where consent is absent the second component requires us to view a delegation of jurisdiction from the perspective of the individuals whose liberty is secured by our tripartite system of government. Although many of the same considerations are necessarily at play in both components of the separation of powers doctrine and although both serve to protect the single overall mission of Article III, *cf. Schor*, 106 S. Ct. at 3266 (Brennan, J., dissenting) ("In my view, the structural and individual interests served by Article III are inseparable."), each emanates from a different perspective.

Applied to the instant case, the second component of the doctrine ensures that whatever right a litigant has to the presence of an Article III judge is effectively safeguarded when jury selection is delegated to a magistrate. While not minimizing the importance of jury selection in



the context of a trial, we decline to hold that Article III requires the physical presence of an Article III judge at that precise point in the adjudicatory process. Historically a judge was not required to be present during *voir dire* or to hear challenges for cause. *See Ford*, 824 F.2d at 1447 (Rubin, J., dissenting). Appellants argue that an Article III judge is required to be present at trial and refer to cases indicating that trial begins with jury selection. The cases cited focus on a defendant's right to be present at jury selection, *see, e.g., Lewis v. United States*, 146 U.S. 370, 373-74 (1892), or on when a trial begins for purposes of the Speedy Trial Act, *see, e.g., United States v. A-A-A Elec. Co.*, 788 F.2d 242, 246 (4th Cir. 1986), rather than on a right to an Article III judge. Hence, they are inapposite. The point at which trial begins and particular constitutional protections attach can vary with the individual right involved. *Cf. Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501, 509 n.8 (1984) (double jeopardy). Thus, even if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection.

The availability of *de novo* review alleviates apprehension that a litigant will be deprived of the tangible benefits ensured by a judicial branch that is separate and independent from the remaining two branches of government. Tacitly acknowledging this point, appellants argue that the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors. We decline to adopt this debatable hypothesis as a justification for a broad constitutional rule.

In sum, we hold that even absent a defendant's consent the Federal Magistrates Act permits district courts to dele-

gate the task of jury selection in felony cases to a magistrate. Additionally, such a delegation does not contravene Article III of the Constitution where, as here, the district court affords *de novo* review of unsustained challenges to jurors for cause.

II *Single or Multiple Conspiracy*

Salazar argues that the indictment charged him with several conspiracies and that he was prejudiced because the evidence at trial proved only a single conspiracy. The issue of the government's indicting for single versus multiple conspiracies arises frequently in criminal jurisprudence. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 755 (1946) (convictions reversed because single conspiracy charged, multiple conspiracies proven); *United States v. Nersesian*, 824 F.2d 1294, 1302-03 (2d Cir.) (evidence properly supported single conspiracy charge), *cert. denied*, 108 S. Ct. 357 (1987); *United States v. Miley*, 513 F.2d 1191, 1205-07 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States v. Borelli*, 336 F.2d 376, 378 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Instead of arguing that the government charged a single conspiracy but proved multiple, unrelated conspiracies—a recurring problem on appeal—Salazar contends that the reverse situation fatally impaired his trial.

We disagree. Multiple conspiracies exist "unless the evidence of the scale of the operation permit[s] the inference that the persons at a particular level must have known that others were performing similar roles." *Miley*, 513 F.2d at 1207. The record is devoid of evidence indicating this quantum of knowledge among appellants while involved in the acts that led to their convictions. In fact, were this a case where the government had charged a single conspir-



acy, we would be hard pressed to find evidence supporting a jury determination that a single conspiracy actually did exist. *Cf. Nersesian*, 824 F.2d at 1302 (analyzing evidence in conspiracy case). Having previously admonished the government that it must "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected," *United States v. Bertolotti*, 529 F.2d 149, 151 (2d Cir. 1975), we should not treat the fact that it heeded such advice in this case with stone-faced indifference. Here, the trial court's failure to charge the jury on single versus multiple conspiracies was not error and Salazar's contrary contention is unpersuasive. This does not mean, of course, that the government may arbitrarily jointly try defendants alleged to have engaged in unrelated conspiracies, for the rules governing joinder and severance still apply.

III *Joinder and Severance*

Salazar, Shanks-Carrera, Vallejo, and Gomez object to the trial court's denial of their motions for severance. It should be noted initially that all of the counts in the indictment concerning the non-RICO appellants were charged also in the RICO count as predicate racketeering acts against Salazar and Chavez-Tesina. Joinder of these defendants in the same indictment was therefore proper under Fed. R. Crim. P. 8(b), even though multiple conspiracies were charged and even though some defendants were not named in all the conspiracy counts, which also constituted RICO predicate offenses, or in the overarching RICO count. *See United States v. Barton*, 647 F.2d 224, 239-40 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981); *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Gallo*, 668 F. Supp. 736, 748 (E.D.N.Y. 1986), *mandamus granted on other grounds*, 834 F.2d 283 (2d Cir. 1987); *United States*

*v. Castellano*, 610 F. Supp. 1359, 1396-97 (S.D.N.Y. 1985). The only question is whether denial of the Fed. R. Crim. P. 14 motions for severance from the joint trial was a clear abuse of the trial court's discretion. *Nersesian*, 824 F.2d at 1303.

### A. *Salazar*

The essence of Salazar's argument for severance encompasses the issues of proper joinder under Rule 8(b) and of single versus multiple conspiracies. These arguments were rejected above and need not be discussed further. Salazar also contends that he was prejudiced by the admission of conspiracy evidence that related to parties charged in the indictment, but who were not tried. This is not a *severance* argument—as appellant contends—but rather a *relevance* argument. The trial court admitted the evidence on the ground that it was relevant to show the breadth of the "enterprise" that formed the basis for the RICO count and to show Salazar's knowledge and intent, which he had put in issue. The weighing of relevance against prejudice to see where the balance tips is entrusted to the discretion of the trial court. Salazar does not argue that the trial court acted arbitrarily or irrationally. *See United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923 (1985). Hence, the denial of the severance motion must stand.

### B. *Shanks-Carrera*

Shanks-Carrera urges that the denial of a severance in his case created unfair prejudice, correctly claiming that he was the least implicated in the broad series of transactions that form the nexus of this prosecution. Different degrees of guilt or notoriety among defendants obviously do



not mandate separate trials. *Nersesian*, 824 F.2d at 1304. Further, that Shanks-Carrera was acquitted on the conspiracy count is a strong indication that the jury was capable of separately evaluating each defendant's culpability and that there was no prejudicial "spillover" of evidence. *See, e.g., Weisman*, 624 F.2d at 1130.

In addition, the relatively small number of defendants, the straightforward nature of the proof, the similarity of the charged offenses, and the short trial all support the trial court's determination that the jury was able fairly to weigh the evidence against each defendant. Nor can it be said that the trial court's denial of Shanks-Carrera's motion for severance resulted in "a miscarriage of justice." *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019 (1985). We therefore affirm the denial of Shanks-Carrera's motion for severance.

### C. *Vallejo and Gomez*

For the reasons discussed above concerning Shanks-Carrera's motion for severance, we also affirm the denial of Vallejo's and Gomez's motions for severance.

## IV *Evidentiary Issues*

### A. *Rule 105 Limiting Instructions*

Vallejo and Gomez assert that the failure to grant a severance coupled with the trial court's limiting instructions unduly impaired their trial. The trial court denied Vallejo's and Gomez's requests that limiting instructions be given contemporaneously with the admission of each piece of physical evidence, delimiting which defendant(s) the evidence was admissible against. Judge McLaughlin did give contemporaneous limiting instructions when co-

conspirator statements were admissible against some—but not all—defendants. In addition, the trial court gave a general instruction to the jury in his charge:

> Some of the charges in this case have been made against some of the defendants and not against others. You must decide what the evidence shows about each defendant without considering any evidence that may have been received solely against some other defendant or defendants.
>
> Each defendant is entitled to have the case against that defendant decided solely on the evidence and the law that applies to him.

Appellants argue that Fed. R. Evid. 105, which provides that "when" evidence is admissible against one party but not another, the court "shall" instruct the jury as to the limited admissibility, requires that instructions accompany every exhibit at the time admitted. Although there is some support for the proposition that Rule 105 mandates a contemporaneous limiting instruction when any type of evidence is admitted for a limited purpose, *see* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065 (1977 & Supp. 1987), the weight of authority is to the contrary. *See United States v. Carson*, 702 F.2d 351, 367 (2d Cir.) (trial court instructed jury on numerous occasions to accord each defendant separate consideration; no mention of contemporaneous instruction), *cert. denied*, 462 U.S. 1108 (1983); *United States v. Losada*, 674 F.2d 167, 171-72 (2d Cir.) (instructions in charge alone adequately protected against prejudice), *cert. denied*, 457 U.S. 1125 (1982); *see also* 1 J. Weinstein, *Weinstein's Evidence* ¶ 105[05], at 105-44 (1986) ("The jury may be instructed either as the [limited] evidence is admitted *or as part of the general charge*.") (emphasis added; footnote omitted).



The timing of Rule 105 limiting instructions with regard to physical evidence is best left to the trial court's discretion. *See United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984); *United States v. Dabish*, 708 F.2d 240, 243 (6th Cir. 1983). Accordingly, the record must be examined to ascertain whether Vallejo and Gomez suffered any harm from the trial court's refusal to give contemporaneous limiting instructions when admitting each piece of physical evidence that was not relevant to them. *See Losada*, 674 F.2d at 171-72 (looking for prejudice); *Weisman*, 624 F.2d at 1130 (same); *United States v. Toliver*, 541 F.2d 958, 963 (2d Cir. 1976) (same).

We conclude that Judge McLaughlin's limiting instruction in his general charge, together with his contemporaneous limiting instructions upon the admission of co-conspirator statements, adequately protected appellants. Where, as here, there are a limited number of defendants, the jury is able more easily to separate the evidence admitted against each of them. *See United States v. Teitler*, 802 F.2d 606, 617 (2d Cir. 1986). Further, the evidence admitted without contemporaneous instructions was physical evidence that lent itself to compartmentalized consideration. *See, e.g., Toliver*, 541 F.2d at 963 (documents). As a consequence, the refusal of the court to give contemporaneous limiting instructions at each introduction of evidence with limited admissibility did not unfairly prejudice Vallejo and Gomez.

### B. *DEA Expert Testimony*

Appellants object to the admission of a DEA expert's testimony concerning the meaning of certain recorded coded telephone conversations between them. Such testimony is subject to challenge only when the expert inter-

prets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade. *See Nersesian*, 824 F.2d at 1308; *United States v. Brown*, 776 F.2d 397, 400-01 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); *United States v. Young*, 745 F.2d 733, 760-61 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Appellants do not allege that the agent's testimony included his interpretations or conclusions. This claim is therefore also without merit.

### C. *Sufficiency of the Evidence*

Chavez-Tesina, Vallejo, and Shanks-Carrera contend that there is insufficient evidence to support their convictions. It is a familiar litany that the standard for appellate review of an insufficiency claim places a "very heavy burden" on the appellant. *Losada*, 674 F.2d at 173. Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979); *United States v. Barnes*, 604 F.2d 121, 157 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). In making this determination, the evidence must be viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), and all permissible inferences construed in its favor, *United States v. Dazzo*, 672 F.2d 284, 288 (2d Cir.), *cert. denied*, 459 U.S. 836 (1982). In addition, the "[e]xistence of and participation in a conspiracy with the requisite criminal intent may be established . . . through circumstantial evidence." *United States v. Sanzo*, 673 F.2d 64, 69 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982). We examine in turn the evidence against each appellant.



#### 1. *havez-Tesina*

Chavez-Tesina's convictions arose primarily out of his involvement in the 50 kilogram transaction. Salazar described his "partner" to de la Cova as a Colombian of Japanese descent who had lived in London. Chavez-Tesina matched the physical description and possessed a British driver's license and Colombian passport when he was arrested. When Salazar told de la Cova that his partner was travelling in New Orleans, independent evidence established that Chavez-Tesina was in fact then in New Orleans.

More important, there was testimony to the effect that Chavez-Tesina was in New Orleans looking for cocaine that would be acceptable in the New York market. As the transaction approached accomplishment, Salazar made telephone calls to Chavez-Tesina's home, confirmed by a pen register. The subject of these calls was the cocaine transaction. In one call, Salazar referred to the other party as "Diego," Chavez-Tesina's first name. The jury was entitled to believe that this evidence linked Chavez-Tesina to Salazar, the RICO enterprise, and the 50 kilogram deal.

#### 2. *Vallejo*

Vallejo, a less active participant in the affairs providing the basis for the charges, was convicted of conspiracy to possess cocaine and possession with intent to distribute arising out of the March 17, 1986 two kilogram cocaine sale to de la Cova. Vallejo argues that there was no proof that he was involved in the conspiracy. The evidence, he argues, shows at best mere association with a drug dealer.

Agent de la Cova heard Salazar tell Vallejo on March 15th that he had something "very, very good." From this

the jury could reasonably conclude that Salazar referred to cocaine and that Vallejo comprehended this meaning. Just two days later, in Vallejo's presence, Gomez delivered two "favors" to Salazar. It is beyond dispute that Gomez delivered cocaine because Gomez said shortly before he was arrested that the "favors" were kilograms of cocaine. This cocaine subsequently was transported to Vallejo's house.

Further support for the inference that Vallejo was involved in a narcotics conspiracy and distributed cocaine is the fact that he delivered a small amount of cocaine to Salazar on March 21st—only moments after Salazar called and asked for some. When he was arrested, Vallejo had a beeper, $2000 in cash, a small amount of drugs and drug paraphernalia, again evidencing that his business relationship with Salazar related to the narcotics trade. *See Carson*, 702 F.2d at 368. This proof, as well as the reasonable inferences arising from it, supports the jury's finding that Vallejo was a knowing participant in the conspiracy.

3. *Shanks-Carrera*

Shanks-Carrera was alleged to be a supporting player in the 50-kilogram transaction. It was he whom the DEA observed carrying a duffel bag—later found to be filled with cocaine—into the apartment arranged as the delivery site. Shanks-Carrera was acquitted of conspiracy, but convicted of possession.

Testifying at trial, he claimed that he had no knowledge that the duffel bag contained cocaine. Appellant explained that incriminating statements made at the time of his arrest—and hiding when DEA agents arrived—were the results of fear and a desire to protect his brother, who allegedly gave him the duffel bag. The jury was in a better position to assess these issues of credibility. Viewing the



evidence in the light most favorable to the government, we find it sufficient to establish that the appellant possessed cocaine with the intent to distribute it.

CONCLUSION

Accordingly, for the reasons discussed above, the judgments of conviction are affirmed.

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OAKES, *Circuit Judge* (dissenting):

I respectfully dissent.

I agree with the majority of the judges in the Fifth Circuit sitting en banc that, at the very least, the practice of permitting magistrates to conduct jury voir dire in felony cases raises serious constitutional questions. *See United States v. Ford*, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 741 (1988). Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminded us, "because the impartiality of the adjudicator goes to the very integrity of the legal system." *Id.* at 1435 (quoting *Gray v. Mississippi*, 107 S. Ct. 2045, 2056 (1987)). The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, *Swain v. Alabama*, 380 U.S. 202, 219 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. *Batson v. Kentucky*, 476 U.S. 79, 88-89 (1986).

And, while double jeopardy does not attach until the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 35 (1978), the Sixth Amendment rights of a defendant to a speedy and public trial, *accord* Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986), to be present while a jury is selected, *Lewis v. United States*, 146 U.S. 370, 376 (1892); *United States v. Crutcher*, 405 F.2d 239, 242-43 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); Fed. R. Crim. P. 43(a), and to the assistance of counsel during jury selection, *see Brewer v. Williams*, 430 U.S. 387, 399 (1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, I feel, is at best maybe. The district court's review of a magistrate's rulings on challenges would surely be difficult, as Judge Higginbotham pointed out in *United States v. Ford*, 824 F.2d at 1436-37, and would undoubtedly lead to appeals on the issue to circuit courts. Perhaps the district court has the inherent power simply to conduct a voir dire a second time. *See United States v. Raddatz*, 447 U.S. 667 (1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the original voir dire impossible. *See United States v. Ford*, 824 F.2d at 1437; *but see id.* at 1446 (Rubin, J., dissenting). In any event, no clear-cut answer can be forthcoming unless and until the Supreme Court decides the constitutional question.



The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to my mind a bad one. Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. at 217. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel shortchanged, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The Constitution instructs us that every criminal defendant, regardless of his status in the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process.

I cannot think that the practice—at least in a jurisdiction such as the Eastern District of New York where the judge, rather than the attorneys, conducts the voir dire—is one that can save much judicial time. It is a practice that is

not followed in the Southern District of New York, and in the districts in which it is used it is exercised without established rules for determining when voir dire should be assigned and without established procedures for review. I would, in the exercise of our supervisory power, prohibit it except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review. By so doing, I would incidentally avoid the problems of statutory and constitutional interpretation that my colleagues solve with a sweep that leaves me, as I suggest, unconvinced. I therefore dissent.